

MAY 21 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6083

DATE SUBMITTED: 09/28/08

DATE ACTIVATED: 01/21/09

EXPIRATION OF SOL: 09/21/2013

COMPLAINANT:

Richard M. Swier, Ed. D.

RESPONDENTS:

MoveOn.org Political Action and Wes Boyd, in
his official capacity as Treasurer

Obama for America and Martin H. Nesbit, in his
official capacity as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)

2 U.S.C. § 441d

11 C.F.R. § 100.26

11 C.F.R. § 100.29

11 C.F.R. § 100.74

11 C.F.R. § 100.75

11 C.F.R. § 100.135

11 C.F.R. § 104.3(b)(3)

11 C.F.R. § 104.4(a)

11 C.F.R. § 109.21

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

FEC Database

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

The complaint in this matter alleges that MoveOn.org violated "its 527 organizational status" by directly soliciting for or supporting a political campaign. Based on the complaint, the responses, and available information, we conclude that there is nothing in the Federal Election Campaign Act of 1971, as amended ("the Act"), or the Commission's regulations

1 that prohibited MoveOn.org Political Action ("MoveOn"), a multi-candidate political
2 committee registered with the Commission, from engaging in the activity described in the
3 complaint. Further, it appears that any costs associated with the specific activity alleged in
4 the complaint is difficult to value and likely *de minimis*. Therefore, even if MoveOn was
5 required to itemize costs associated with the e-mail attached to the complaint, we recommend
6 that the Commission dismiss this matter as to MoveOn in an exercise of its prosecutorial
7 discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Finally, we recommend that
8 the Commission find no reason to believe that Obama for America and Martin H. Nesbit, in
9 his official capacity as Treasurer, violated 2 U.S.C. §§ 434(b) or 441a(f).

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. Factual Summary**

12 The complaint in this matter alleges that MoveOn violated "its 527 organizational
13 status" by directly soliciting or supporting a political campaign. Complaint, p.1. Specifically,
14 the complainant alleges that on September 21, 2008, he received a phone call from an
15 individual named Erin, who identified herself as a member of the Boston office of MoveOn
16 and was calling from telephone number (781) 405-6580. *Id.* The complainant states that
17 during the call Erin asked him to go to the Sarasota County Obama campaign office and help
18 with the Obama campaign. *Id.* According to the complaint, Erin stated that "they have lots of
19 Obama supporters" in the Boston MoveOn offices. *Id.* Erin also allegedly provided the
20 complainant with the number of the Sarasota County Obama Campaign Headquarters – (941)
21 955-9415. *Id.* Attached to the complaint is an e-mail from Adam Ruben, the political director
22 of MoveOn, soliciting volunteers for the Obama campaign, containing the following content:

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1 In response to the complaint, MoveOn asserts that the complaint contains factual
2 errors. MoveOn Response, pp. 1 and 3. In this regard, MoveOn points out that it is a federal
3 political committee. *Id.*, p. 2. Moreover, MoveOn states that it did not have a Boston office
4 during the 2007-2008 election cycle, but rather the call referenced in the complaint was made
5 at one of a series of "MoveOn for Obama" house parties organized by MoveOn. *Id.*; *see also*
6 Declaration of Adam Ruben at ¶¶ 2, 4 ("Ruben Decl.") MoveOn explains that the house
7 parties were organized by volunteers in their own homes, and that guests at the parties would
8 call MoveOn supporters using the guest's own cell phone or the telephone of the party host.
9 Ruben Decl. at ¶¶ 4-5.

1 According to MoveOn, Erin Sweeney, a MoveOn volunteer, attended a house party
2 near Boston and apparently used her cell phone or the telephone of the party host to call the
3 complainant, who had participated in MoveOn's online campaigns and therefore appeared on
4 a list of MoveOn supporters. MoveOn Response, p. 2; Ruben Decl. at ¶¶ 6-7. If the person
5 called signed up to volunteer, the caller recorded that information and called a MoveOn
6 hotline to record who had signed up. Ruben Decl. at ¶ 10. MoveOn states that the e-mail
7 attached to the complaint conforms to MoveOn's practice, which was to send a confirming
8 e-mail to each MoveOn supporter who had signed up to volunteer at an Obama campaign
9 office. MoveOn Response, p. 2; Ruben Decl. at ¶ 10. MoveOn represents that it created
10 the tools used, including the lists of supporters, the technology, and the hotline, for its
11 operations generally, and not for its "MoveOn for Obama" house parties. Ruben Decl. at
12 ¶ 11.

13 In response to the complaint, Obama for America ("OFA") asserts that the complaint
14 does not allege any facts that would describe a violation of federal campaign finance law on
15 the part of OFA. OFA Response, p. 1. OFA points out that it never opened an office in
16 Sarasota County and that the telephone number allegedly provided to the complainant was the
17 telephone number for the Florida Democratic Party's field office in Sarasota, Florida. *Id.*
18 OFA states that even if the MoveOn volunteer had provided contact information for an OFA
19 office, that would not constitute a violation of law. OFA Response, p. 2.

1 **B. Legal Analysis**

2 Contrary to the complaint's assertion, MoveOn is a multi-candidate political
3 committee that registered with the Commission on October 29, 1998.¹ There is nothing in the
4 Act or the Commission's regulations that prohibits a political committee from engaging in the
5 activity described in the complaint. Under the Act, political committees can make
6 contributions, within appropriate limits, and expenditures as long as they properly report
7 them. *See* 2 U.S.C. §§ 434, 441a(a)(2).

8 The term contribution is defined as "any gift, subscription, loan, advance, or deposit of
9 money or anything of value made by any person for the purpose of influencing any election
10 for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, the term expenditure is defined as
11 "any purchase, payment distribution, loan, advance, deposit, or gift of money or anything of
12 value made by any person for the purpose of influencing any election for Federal office."
13 2 U.S.C. § 431(9)(A)(i). The definition of "contribution" does not include the value of
14 services provided without compensation by any individual who volunteers on behalf of a
15 political committee. *See* 11 C.F.R. § 100.74. Similarly, no "contribution" or "expenditure"
16 results where an individual volunteer provides the use of real or personal property to a
17 candidate. *See* 11 C.F.R. §§ 100.74, 100.135. Here, MoveOn asserts that Erin Sweeney was
18 a volunteer at a "MoveOn for Obama" house party and used her personal cell phone or the
19 telephone of the party host to call the complainant. We have no information to the contrary.
20 Thus, the volunteer activity at issue does not constitute a contribution or expenditure and thus
21 did not trigger any reporting requirement.

¹ A related entity, MoveOn.org Voter Fund, is organized under Section 527 of the Internal Revenue Code and registered as a political committee in 2006. *See* MUR 5754 (MoveOn.org Voter Fund), Conciliation Agreement, available at <http://eas.rictusa.com/easdocs/000058F4.pdf> (Nov. 17, 2006). The e-mail confirming the activity at issue in this matter, attached to the complaint, was sent by "Adam Ruben, MoveOn.org Political Action" and does not appear to be related to MoveOn.org Voter Fund.

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1 Nor do we have information indicating that there were any other costs incurred by
2 MoveOn in connection with these activities that would be independent expenditures or
3 operating expenses requiring disclosure, or that would be in-kind contributions to OFA. In
4 particular, it is unclear that MoveOn was required to report the costs of the e-mail sent by
5 MoveOn's political director, attached to the complaint, as an itemized disbursement,
6 regardless of whether it was an independent expenditure or an operating expense.² Under the
7 Commission's regulations, political committees must itemize any independent expenditure or
8 operating expense that, by itself or when added to other independent expenditures or
9 operating expenses made to the same payee during the same calendar year, exceeds \$200. See
10 11 C.F.R. §§ 104.3(b)(3)(i) and (viii), 104.4(a). While the complaint attached a single e-mail
11 that likely involved a *de minimis* cost to the committee, MoveOn's response suggests that the
12 committee may have sent similar e-mails to many individuals, the aggregate costs of which
13 may have exceeded the \$200 threshold and triggered reporting obligations. Specifically,
14 MoveOn's response states, "It was the practice of MoveOn [] to send a confirming e-mail to
15 each MoveOn supporter who had signed up to volunteer at an Obama campaign office."
16 MoveOn Response, p. 2. Thus, whether these e-mails are deemed independent expenditures
17 or operating expenses, MoveOn may have been required to itemize the costs associated with
18 them if the costs exceeded \$200. See Advisory Opinion 1999-37 (X-PAC) (political
19 committee's distribution of advertisements as attachments to e-mail messages represented

² An independent expenditure is an expenditure for a communication by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. See 2 U.S.C. § 431(17); 11 C.F.R. §§ 100.16, 109.10(a); see also *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate" because *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

1 independent expenditures with concomitant reporting obligations if the costs exceeded the
2 \$200 threshold). Nonetheless, given that MoveOn appears to have tailored this e-mail to a
3 single recipient and represents that it created the tools used for its confirming e-mails for its
4 operations generally, *see* Ruben Decl. at ¶ 11, as well as the difficulty in valuing the
5 incremental cost of a single e-mail, we believe that this issue does not warrant the use of
6 additional Commission resources.

7 Moreover, the e-mail does not appear to constitute an in-kind contribution to OFA.
8 Specifically, it was not an electioneering communication because it was not a broadcast,
9 cable, or satellite communication; nor was it a public communication because an e-mail is not
10 a mass mailing, and it was not placed for a fee on another person's Web site. *See* 11 C.F.R.
11 §§ 100.26, 100.27 and 100.29; *see also Final Rules on Internet Communications*, 71 Fed.
12 Reg. 18,589, 18,596 (Apr. 12, 2006) ("The Commission does not consider e-mail to be a form
13 of 'general public political advertising' because there is virtually no cost associated with
14 sending e-mail communications...."). As a result, it would not meet any of the content
15 standards in the coordinated communications regulations at Section 109.21(c).

16 In light of the difficulty in valuing the incremental cost associated with a single e-mail
17 for purposes of itemization, and our lack of information regarding the number, content, or
18 incremental cost of other e-mails sent by MoveOn, and in light of an absence of information
19 regarding any other potential costs associated with these activities, we recommend that the
20 Commission dismiss this matter in an exercise of its prosecutorial discretion. *See Heckler v.*
21 *Chaney*, 470 U.S. 821, 831 (1985) (in determining whether to pursue an enforcement action,
22 an agency "must not only assess whether a violation has occurred, but whether agency
23 resources are best spent on this violation or another . . . [and] whether the particular

enforcement action requested best fits the agency's overall policies . . ."). In addition, because the content prong of the coordinated communications regulations is not met, we recommend that the Commission find no reason to believe that Obama for America and Martin H. Nesbit, in his official capacity as Treasurer, violated 2 U.S.C. §§ 434(b) or 441a(f).

III. RECOMMENDATIONS

- 1) Dismiss this matter as to MoveOn.org Political Action and Wes Boyd, in his official capacity as Treasurer;
- 2) Find no reason to believe that Obama for America and Martin H. Nesbit, in his official capacity as Treasurer, violated 2 U.S.C. §§ 434(b) or 441a(f);
- 3) Approve the appropriate letters; and
- 4) Close the file.

Thomasenia P. Duncan
General Counsel

5-21-09
Date

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